

# The sharing economy and the law: food for European lawyers

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## EDITORIAL

# THE SHARING ECONOMY AND THE LAW

## Food for European Lawyers

CAROLINE CAUFFMAN AND JAN SMITS\*

In 2011, Time Magazine qualified the sharing economy as one of the ten ideas that will change the world.<sup>1</sup> It would entail moving from an ‘ownership society’ to a society in which people share and collaborate. Over the last five years, this development has enjoyed a real boom. One important example of this is the creation of numerous internet platforms that have made it easier for businesses and citizens to offer goods and services to the public. While the rise of platforms allowing for the sale of goods by commercial parties was openly embraced by society, the rise of platforms such as Uber and Airbnb, allowing non-professionals to offer services, has given rise to quite some social and legal consternation. In many cities, taxi drivers have engaged in vigorous protests against Uber, and in particular its application UberPop, which allows non-professional and non-licensed drivers to carry out taxi services. Equally, the hotel sector complains about unfair competition by private persons offering accommodation via Airbnb, without having to respect the stringent rules applicable to hotels.

The official responses of the European Union Member States vis-à-vis this turmoil have differed. While the UK quickly saw the advantages of the ‘new economy’ created via internet platforms,<sup>2</sup> other Member States (initially)<sup>3</sup> took a more critical stance. Courts and sectoral regulators in several Member States such as Belgium, the Netherlands,

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<sup>1</sup> B. Walsh, ‘Today’s Smart Choice: Don’t Own. Share’, *Time Magazine* (2011), [http://content.time.com/time/specials/packages/article/0,28804,2059521\\_2059717,00.html](http://content.time.com/time/specials/packages/article/0,28804,2059521_2059717,00.html).

<sup>2</sup> See e.g., D. Woskow, ‘Unlocking the sharing economy. An independent review’, *United Kingdom Government* (2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf), p. 6. See also, Commission staff working document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy – supporting analysis, COM(2016) 356 final, p. 49.

<sup>3</sup> In the meantime, Belgium has for example adopted certain pro-collaborative economy rules, see Articles 22–23 and 35–43 of the Program Act of 1 July 2016, Belgian Official Journal, 4 July 2016.

France and Germany prohibited at least certain Uber services<sup>4</sup> and/or imposed (criminal) sanctions on Uber drivers.<sup>5</sup> An early judgment by a Brussels court prohibiting Uber<sup>6</sup> was strongly criticized by the then Vice-President of the European Commission Neelie Kroes.<sup>7</sup> Subsequently, the succeeding Vice-President of the Commission, Jyrky Katainen,<sup>8</sup> and the EU Commissioner for the Internal Market, Elżbieta Bieńkowska, also uttered criticism on the tendency of certain Member States to prohibit sharing economy business models.<sup>9</sup>

Since the last quarter of 2015, the Commission has undertaken many initiatives relating to the sharing economy. In its Single Market Strategy, adopted in October 2015, the Commission announced that it would develop a European agenda for the collaborative economy, including guidance on how existing EU law applies to collaborative or sharing economy business models.<sup>10</sup> Between September 2015 and June 2016, the Commission

<sup>4</sup> See e.g. for Belgium: Pres. Commercial Court Brussels 31 March 2014, A/14/01645 partially confirmed by Pres. Commercial Court Brussels 23 September 2015, A/14/62.859, both cited by E. Terryn, 'The sharing economy in Belgium – a case for regulation?', 5 *Journal of European Consumer and Market Law* (2016), p. 45–46 (the appellate court confirmed the prohibition to operate a platform transferring requests for paid passenger transport services by drivers without a taxi license, but made a preliminary referral to the Court of Justice regarding the legality of interpreting the national law in such a way that it also prohibits the provision of unpaid passenger transport services without a taxi license. By Order of 27 October 2016 the preliminary referral was declared inadmissible, mainly because the referring court did not make clear why the national legislation in question applied to non-remunerated services and because the type of the activity in question and the way it was provided were not described with sufficient clarity, see Case C-5261:15 *Uber Belgium BVBA*, EU:C:2016:830). Germany: Kammergericht Berlin, 11 December 2015, 5 U 31/15, juris (prohibiting UberBlack insofar as it concerned transport against remuneration, i.e. charges exceeding operational costs). France: Cour d'Appel Paris 7 décembre 2016, [www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=4843](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4843). The Netherlands: Rechtbank Zwolle-Lelystad 14 March 2007, Rechtspraak.nl, NJF 2007, 297, IER 2007, 73, note H. Struik, WBP 2009/89, NL:CBB:2014:450. Italy: Tribunale di Milano, Sezione specializzata in materia di impresa 'A', ordinanza, 25 May 2015, [www.giureta.unipa.it/Trib\\_Milano\\_25052015.pdf](http://www.giureta.unipa.it/Trib_Milano_25052015.pdf); and, on appeal, Tribunale di Milano, Sezione specializzata in materia di impresa 'A', ordinanza, 2 July 2015, [www.dimt.it/wp-content/uploads/2015/07/ordinanza-su-reclamo-Uber.pdf](http://www.dimt.it/wp-content/uploads/2015/07/ordinanza-su-reclamo-Uber.pdf). On these cases, see G. Noto la Diega, 'Uber law and awareness by design. An empirical study on online platforms and dehumanised negotiations', *Droit de la consommation – Consumentenrecht* (2015), p. 398 et seq.

<sup>5</sup> Belgium: Tribunal de police francophone de Bruxelles, 20<sup>e</sup> chambre, 4 May 2015, VAV-CRA 2015/3, 36, (seizure of the driver's car), cited by E. Terryn, 5 *EuCML* (2016), p. 45. Italy: Tribunale di Milano, Sezione specializzata in materia di impresa 'A', ordinanza, 2 July 2015, [www.dimt.it/wp-content/uploads/2015/07/ordinanza-su-reclamo-Uber.pdf](http://www.dimt.it/wp-content/uploads/2015/07/ordinanza-su-reclamo-Uber.pdf) (prohibiting a person to provide driving services via Uber).

<sup>6</sup> Belgium: Pres. Commercial Court Brussels 31 March 2014, A/14/01645, cited by E. Terryn, 5 *EuCML* (2016), p. 45.

<sup>7</sup> Trends, 'Neelie Kroes "diep verontwaardigd" over verbod op Uber- Taxi's', *Knack* (2014), <http://trends.knack.be/economie/e-business/neelie-kroes-diep-verontwaardigd-over-verbod-op-uber-taxi-s/article-normal-217501.html>.

<sup>8</sup> Reuters, 'Europe should embrace sharing economy, says EU', *Irish Times* (2015), [www.irishtimes.com/business/economy/europe-should-embrace-sharing-economy-says-eu-1.2408872](http://www.irishtimes.com/business/economy/europe-should-embrace-sharing-economy-says-eu-1.2408872).

<sup>9</sup> D. Robinson, 'Brussels urges more caring for sharing economy', *Financial Times* (2016), [www.ft.com/cms/s/0/4c19a666-267f-11e6-8ba3-cdd781d02d89.html#axzz4Di5l2AWi](http://www.ft.com/cms/s/0/4c19a666-267f-11e6-8ba3-cdd781d02d89.html#axzz4Di5l2AWi).

<sup>10</sup> See, European Commission Press Release, 'A deeper and fairer Single Market: Commission boosts opportunities for citizens and business', 28 October 2015, [http://europa.eu/rapid/press-release\\_IP-15-5909\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5909_en.htm), with links to related documents.

carried out a public consultation<sup>11</sup> and a Eurobarometer survey<sup>12</sup> to assemble the views of public authorities, entrepreneurs and individuals on the sharing economy. It organized several workshops to discuss the development of the collaborative economy with administrators and entrepreneurs,<sup>13</sup> and invited a number of analytical papers from academia, research institutes and consultancy firms.<sup>14</sup> Furthermore, it commissioned an exploratory study on the legal framework applicable to the sharing economy in the Member States.<sup>15</sup> Even before this study was completed, the Commission published a Communication containing the promised 'European agenda for the collaborative economy'.<sup>16</sup>

In its Communication, the Commission uses the term collaborative economy to refer to 'business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals'.<sup>17</sup> According to the Commission '[c]ollaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit'.<sup>18</sup>

With its Communication, the Commission intends to provide non-binding legal guidance and policy orientation to public authorities, market operators and interested citizens for the balanced and sustainable development of the collaborative economy with a focus on how existing EU law should be applied to the collaborative economy.<sup>19</sup> Key issues dealt with by the Commission are market access requirements, liability regimes, protection of users, the distinction between the self-employed and workers and taxation. This Communication is important enough to discuss in some more detail.<sup>20</sup>

With regard to market access requirements, the Commission advises Member States to reconsider and abolish them for all market players where they are no longer needed.

<sup>11</sup> European Commission, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24 September 2015, [https://webcache.googleusercontent.com/search?q=cache:j1Q\\_0EdNR7EJ:https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud+&cd=1&hl=nl&ct=clnk&gl=nl](https://webcache.googleusercontent.com/search?q=cache:j1Q_0EdNR7EJ:https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud+&cd=1&hl=nl&ct=clnk&gl=nl).

<sup>12</sup> European Commission, The use of collaborative platforms, *Eurobarometer* (2016), <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2112>.

<sup>13</sup> European Commission, Collaborative Economy, [http://ec.europa.eu/growth/single-market/strategy/collaborative-economy/index\\_en.htm](http://ec.europa.eu/growth/single-market/strategy/collaborative-economy/index_en.htm). See also Commission staff working document, p. 4.

<sup>14</sup> European Commission, Collaborative Economy, [http://ec.europa.eu/growth/single-market/strategy/collaborative-economy/index\\_en.htm](http://ec.europa.eu/growth/single-market/strategy/collaborative-economy/index_en.htm).

<sup>15</sup> Call for tender n° Chafea/2015/CP/02, 'The Exploratory Study of Consumer Issues in the Sharing Economy', 2 February 2016, [http://ec.europa.eu/chafea/consumers/tender-2015-cp-02\\_en.html](http://ec.europa.eu/chafea/consumers/tender-2015-cp-02_en.html).

<sup>16</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy, COM(2016) 356 final. (Collaborative Economy Communication).

<sup>17</sup> *Ibid.*, p. 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, p. 2.

<sup>20</sup> For a more comprehensive discussion of the Communication, see C. Cauffman, 'The Commission's European agenda for the collaborative economy – (Too) platform and service provider friendly?', 5 *EuCML* (2016), p. 235–243.

Where market access requirements cannot be abolished for traditional service providers, the Commission nevertheless urges Member States to consider abolishing (some of) them for participants in the collaborative economy. According to the Commission, this could be justified by the fact that the specific characteristics of collaborative economy business models and the tools (for example, customer reviews) they may use to address public policy concerns (for example, access, quality, safety or information asymmetries) may reduce the need for certain elements of regulation.<sup>21</sup> The Commission also finds that private individuals offering services via collaborative platforms on a peer-to-peer and occasional basis should not automatically be treated as professional service providers.

With regard to liability, the Commission limits its advice to the application of the hosting exemption contained in Article 14 of the E-Commerce Directive.<sup>22</sup> This exemption implies that a provider of hosting services is not liable for the information stored at the request of a recipient of the services, on condition that (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. According to the Commission, it depends on the legal and factual circumstances of the case as to whether the collaborative platform can benefit from the hosting exemption. The carrying out of additional or ancillary services should not exclude the application of the hosting exemption to the hosting services carried out by the platform and responsible behavior by all types of online platforms in the form of voluntary action, for example to help tackle the important issue of fake or misleading reviews, is encouraged.<sup>23</sup>

However, the extent to which platforms will actually comply with this advice remains to be seen. A certain reservation on their part is to be expected. Indeed, when the platform actively monitors the content of reviews, it is doubtful that it could still be considered to qualify for the hosting exemption in view of the decision of the Court of Justice in *Google France/Louis Vuitton* since this exemption only ‘applies (...) when [the] service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.’<sup>24</sup>

In view of the protection of users, Member States are encouraged to seek a balanced approach to ensure that consumers enjoy a high level of protection in particular from unfair commercial practices. At the same time, they must not impose disproportionate

<sup>21</sup> Collaborative Economy Communication, p. 4.

<sup>22</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, [2000] OJ L 178/1.

<sup>23</sup> Collaborative Economy Communication, p. 7–9.

<sup>24</sup> Joined Cases C-236/08 to C-238/08 *Google France SARL and Google Inc./Louis Vuitton*, EU:C:2010:159, para. 120 and operative part 3. Confirmed in Case C-324/09 *L'Oréal SA and Others v. eBay International AG and Others*, EU:C:2011:474, para. 116, 123 and operative part 6.

information obligations and other administrative burdens on private individuals who are not traders but who provide services on an occasional basis. The Commission also sees a role for the use of online trust mechanisms (for example, quality labels) to increase trust and credibility.<sup>25</sup>

The Commission furthermore expresses the view that Member States should not only provide guidance on the applicability of their national employment rules to the collaborative economy. Rather they should assess the adequacy of such rules considering the different needs of workers and self-employed individuals in the digital world as well as the innovative nature of collaborative business models.<sup>26</sup>

In matters of taxation, the Commission's advice is more conservative. Member States are encouraged to facilitate and improve tax collection by using the possibilities provided by collaborative platforms. These platforms should take a proactive stance in cooperating with national tax authorities to establish the parameters for an exchange of information about tax obligations, while ensuring compliance with legislation on the protection of personal data and without prejudice to the intermediary liability regime of the E-Commerce Directive. Furthermore, Member States are invited to assess their tax rules to create a level playing field for businesses providing the same services and to continue their simplification efforts, increasing transparency and issuing online guidance on the application of tax rules to collaborative business models.<sup>27</sup>

The most interesting aspect of the Communication is that, although the Commission recognizes the importance of consumer protection and the need to ensure fair working conditions and adequate and sustainable social protection, on many points it is willing to go along with the claims made by collaborative platforms that the specific characteristics of the collaborative business models allow for the application of less stringent rules than those applicable to traditional business models.

Shortly after the Commission published its Communication, the Research Group on the Law of Digital Services presented a proposal for a directive on online platforms dealing with, inter alia, the use of reputational feedback systems, the duties of platforms towards suppliers and customers and the liability of E-platforms. The proposal is intended to provoke discussion around the regulation of online platforms.<sup>28</sup> We hope that part of the discussion will find its way to the *Maastricht Journal*.

Apart from this more technical discussion, the Maastricht Journal also hopes to provide a forum for discussion of more fundamental issues raised by the phenomenon of the collaborative economy, such as the boundaries of traditional concepts like businesses and consumers, the desirability of a different treatment of B2C and other contracts, and the impact of the sharing economy on labour and social security law.

<sup>25</sup> Collaborative Economy Communication, p. 11.

<sup>26</sup> Ibid., p. 13.

<sup>27</sup> Ibid., p. 15.

<sup>28</sup> Research group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms', 5 *EuCML* (2016), p. 164 et seq.